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No. 02-1580

In the Supreme Court of the United States

RICHARD VIETH, ET AL.,
Appellants

v.

ROBERT C. JUBELIRER, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLEES CORTÉS AND ACCURTI

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General

J. BART DELONE*
Senior Deputy Attorney General

Counsel for Appellees Cortés and Accurti

Office of Attorney General
Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-3226

*Counsel of Record

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QUESTIONS PRESENTED

1. Whether the District Court correctly dismissed the appellants' claim of partisan gerrymandering in Pennsylvania's congressional redistricting statute?

2. Whether a State violates the Equal Protection Clause when it draws congressional redistricting lines for partisan political ends and for no other reason?

3. Whether the Constitution requires States to draw congressional districts which ensure some degree of proportionality between the votes which a political party receives statewide and the number of congressional seats it wins?

PARTIES TO THE PROCEEDING

The appellants are Richard and Norma Jean Vieth and Susan Furey.

The appellees on whose behalf this brief is filed are Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania; and Monna J. Accurti, Commissioner of the Bureau of Commissions, Elections and Legislation of Pennsylvania's Department of State.

Other appellees, separately represented, are Edward G. Rendell, the Governor of Pennsylvania; Catherine Baker Knoll, the Lieutenant Governor; Robert C. Jubelirer, the President Pro Tempore of the Pennsylvania Senate; and John M. Perzel, the Speaker of the Pennsylvania House of Representatives.

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OPINIONS BELOW

The District Court's opinion of January 24, 2003, is reported at 241 F.Supp.2d 478 and is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a. An earlier opinion of the District Court addressing appellants' claim of partisan gerrymandering, filed on February 22, 2002, is reported at 188 F.Supp.2d 532 and is reprinted at J.S. App. 13a. The District Court's opinion of April 8, 2002, which addresses appellants' one-person one-vote claim, is reported at 195 F.Supp.2d 672 and is reprinted at J.S. App. 46a.

STATEMENT OF JURISDICTION

This is an appeal from a final order issued by a three-judge district court, over which the Court has jurisdiction pursuant to 28 U.S.C. § 1253. The District Court's order was entered on January 24, 2003. Appellants filed their notice of appeal on February 24, 2003 and filed their Jurisdictional Statement within sixty days of that date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2 of the Constitution provides in relevant part that the members of the House of Representatives shall be "chosen ... by the people of the several States...."

2. Article I, Section 4 of the Constitution provides in relevant part that "[t]he times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations...."

3. Section 1 of the Fourteenth Amendment to the Constitution provides in relevant part that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

4. 2 U.S.C. § 2c provides that "[i]n each State entitled to more that one Representative ... there shall be established a number of districts equal to the number of Representatives...." Section 2a of Title 2 provides that after the decennial reapportionment of the House of Representatives among the States, each State is to be "redistricted in the manner provided by the law thereof."

5. Pennsylvania's Act 2002-34 ("Act 34"), *codified at* Pa. Stat. Ann., tit. 25, §§ 3595.101 through 3595.501 (Purdon 2003 Supp.) establishes the boundaries of Pennsylvania's nineteen congressional districts. It is available on WestLaw at PA ST 25 P.S. § 3595.101 *et seq.* but is not reprinted in the record.

STATEMENT OF THE CASE

This case arises out of the congressional redistricting statute adopted by the Pennsylvania legislature in the wake of the 2000 census. The appellants are three Pennsylvania voters who claim that the statute violates the Constitution because, they say, it guarantees Republicans "a supermajority of seats, even if their congressional candidates attract fewer votes than do their Democratic opponents." Br. for Appellants 2.

Appellants, instead of providing a "concise statement ... setting out the facts material" to this case, Sup. Ct. R. 24.1(f), open their brief with an overtly argumentative "Statement" exhorting the Court to save the Nation from what they see as the evils of partisan redistricting. *E.g.*, Br. for Appellants 3 ("there are compelling reasons why this Court should ... put[] a stop to these severe

distortions of the democratic process"). To this end, the "Statement" advances a series of tendentious and highly dubious propositions which appellants assert as facts, but which are neither supported by the record of this case, nor so obviously true as to need no support, nor so universally accepted as to be beyond reasonable dispute. We therefore first address these assertions.

1. First, appellants claim that partisan gerrymandering has not only rendered the House of Representatives "unrepresentative of the people" — a remarkable assertion in itself — but has also greatly reduced the number of competitive districts nationwide, "drain[ing] any potential for fixing that imbalance through the normal electoral process." *Id.* at 4. In fact, however, the idea that recent trends in redistricting have reduced political competition is the subject of considerable disagreement.

High rates of incumbent retention are neither new nor peculiar to the House of Representatives. In the last decade, "about 90% of the Senators and 95% of the House members sought reelection and won. Research on elections for Governor and other statewide offices that are similarly unaffected by redistricting, such as Attorney General, have shown incumbency advantages sometimes even exceeding those for House incumbents." Nathaniel Persily, *In Defense of Foxes Guarding the Hen House: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 665 (2002). Factors other than redistricting, such as franking privileges, generous travel allowances, staff devoted solely to constituent service, and the rising costs of campaigning coupled with the advantages of incumbency in raising campaign funds — none of which appellants mention — play a commanding role in producing this phenomenon; indeed, some researchers have found no connection at all between redistricting and the high rate of incumbent

success. *See* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering "Fair Representation" and Exegesis into the Judicial Role*, 78 Notre Dame L. Rev. 527, 550-554 (2003) (collecting commentary).

In fact, *partisan* gerrymandering — drawing district lines so as to maximize the advantage of one political party — is, at least to some degree, not even consistent with protecting incumbents, since it is apt to target incumbent members of the opposing party for defeat or elimination. *Bipartisan* gerrymanders, on the other hand — districts which are drawn to protect the interests of both parties, *see Gaffney v. Cummings*, 412 U.S. 735 (1973) — are by definition concerned with suppressing competition, yet go unmentioned by appellants.

Appellants likewise claim that, as the result of gerrymandering, "Representatives increasingly cater to their donors and party insiders," rather than to the voters, Br. for Appellants 9, but they offer no real support for this claim. On the level of individual Representatives, there is no evidence that safe districts produce unresponsive incumbents, Persily, 116 Harv. L. Rev. at 660; and on the national level, it is only a few elections since the House of Representatives changed hands for the first time in generations: hardly evidence that the voters have lost control of the process.

Finally, appellants claim that partisan gerrymandering has caused "historic levels of polarization" in the House. Br. for Appellants 9-10. Researchers, however, have found similar levels of polarization in the Senate, which is not affected by redistricting. Persily, 116 Harv. L. Rev. at 669. Lingering resentment over the loss of Democratic control of the House in the 1994 elections, the legacy of mistrust which both caused and resulted from the investigation and impeachment of President Clinton, bitterness over the 2000 presidential election, and simple

disagreements over public policy have surely contributed far more than redistricting to this state of affairs.

More importantly, appellants' assertion that these phenomena — assuming that they exist at all — show that "reform is needed," Br. for Appellants 11, masks a series of public policy judgments which are themselves controversial. Thus, appellants assume that a competitive district — in which the winner receives, say, 50.1% of the vote — is in some sense "better" than a "safe" district in which the winner receives 60%. Similarly, appellants assume that a Congress in which the positions of the two major parties substantially overlap is somehow "better" than a Congress in which there are clear lines of division between the parties. We discuss this in more detail in the Argument section; we note here only that the Constitution provides no basis for making these judgments. We turn now to the facts and proceedings in the District Court.

2. As a result of the 2000 decennial census, Pennsylvania's congressional delegation was reduced from twenty-one to nineteen representatives. J.S. App. 3a. In response, the Pennsylvania General Assembly enacted Act 2002-1 ("Act 1"), which redivided the Commonwealth among nineteen congressional districts. Although the appellants condemn Act 1 as an exercise in "extreme ... partisan bias," J.S. at 4, they acknowledge (in a footnote) that in fact Act 1 enjoyed bipartisan support. J.S. at 4 n.2. Forty-two — nearly half — of the members of the Democratic Caucus of the Pennsylvania House of Representatives voted in favor of Act 1, and without the support of these House Democrats Act 1 would not have passed. J. S. App. 89a.

Of the Commonwealth's roughly 7.7 million registered voters, about 3.7 million (48%) are Democrats, and about 3.2 million (42%) are Republicans. J.S. App. 84a. Of the

nineteen congressional districts created by Act 1, seven have a majority Democrat registration and seven have a majority Republican registration. In the remaining five districts, two have a Democrat plurality of registered voters and three have a Republican plurality. J.S. App. 90a-91a. Nevertheless, appellants alleged that under Act 1, Democrat candidates would take only five or six seats, while Republicans would win thirteen or fourteen, even though Democrat candidates were likely to win a majority of the statewide congressional vote. This, they claimed would constitute an impermissible partisan gerrymander. J.S. App. 137a-138a.

Neither of those projections, however, proved reliable. Election results that do not reflect registration figures are not unusual in Pennsylvania; in statewide elections between 1998 and 2001, Republican candidates won thirteen elections and Democrats won three. J.S. App. 85a-87a. In the 2002 congressional elections held pursuant to Act 1, Republican candidates received 56.2% of the statewide vote, while Democrats received 41.5%. Republicans won twelve of Pennsylvania's nineteen seats, and Democrats took seven.[1]

The appellants also alleged that Republicans have "essentially shut Democrats and Democratic voters out of the political process." J.S. App. 140a. The complaint, however, contains no allegations to support this conclusory assertion. As the District Court remarked,

> there are no allegations that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-

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[1] *See* PA DEPARTMENT OF STATE, *Official 2002 General Election Results*, available at http://www.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?year=2002&etype=G (visited May 29, 2003).

> minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of pubic concern.

J.S. App. 39a.

3. The appellants brought this action in the Middle District of Pennsylvania, which convened a three-judge court pursuant to 28 U.S.C. § 2284. In the District Court, the appellants raised two principal claims: first, that the congressional districts drawn by Act 1 represented an impermissible partisan gerrymander, in violation of the principles recognized in *Davis v. Bandemer*, 478 U.S. 109 (1986); and second, that Act 1's districts were not precisely equal and therefore violated the Constitution's guarantee of one person, one vote. J.S. at 5-6; J.S. App. 18a-19a.

On February 22, 2002, the District Court dismissed the appellants' partisan gerrymandering claim.[2] J.S. App. 39a, 44a-45a. The District Court, however, declined to dismiss appellants' one person, one vote claim. J.S. App. 28a-31a. After an evidentiary hearing, the District Court struck down Act 1 on one person, one vote grounds, enjoined its implementation, and ordered the Pennsylvania General Assembly to enact a new redistricting plan and submit it to the court for its review and approval. J.S. App. 46a, 57a. The District Court, however, stayed its injunction pending the disposition of

[2]At the same time, the District Court dismissed claims based on the Privileges and Immunities Clause, the First Amendment, and Section 1983, for failure to state a claim, and dismissed all claims against the Commonwealth itself on the basis of the Commonwealth's Eleventh Amendment immunity. J.S. App. 21a-23a, 39a-42a.

appeals taken by the Governor and other defendants[3]; and Pennsylvania, using the congressional districts drawn by Act 1, held its primary and general elections, with the results described above.

In the meantime, the Pennsylvania General Assembly enacted a revised congressional redistricting plan, known as Act 2002-34 ("Act 34"), to cure the one-person one-vote flaw which the District Court had identified and to govern future elections. After a further hearing, the District Court agreed that "Act 34 represents a good faith effort to achieve precise mathematical equality in congressional district-to-district population." J.S. App. 10a.

The appellants asserted, however, that Act 34 had not cured what they regarded as Act 1's shortcomings as to partisan gerrymandering, and they asked the District Court to impose remedial districts. J.S. App. 1a, 11a. On January 24, 2003, the District Court denied the appellants' motion, relying on its earlier decision:

> In [*Vieth v. Commonwealth of Pennsylvania*, 188 F.Supp.2d 532 (M.D.Pa. 2002) J.S. App. 13a-45a] *Vieth I*, the court dismissed this claim because "plaintiffs [did not] allege facts indicating that they had been shut out of the political process, and therefore, they cannot establish an actual discriminatory affect on them" as required by *Davis v. Bandemer*, [478 U.S. 109 (1986)] . . .. Act 34 is essentially the same redistricting plan as Act 1 except

[3]The appeal of the Governor and other executive branch defendants was docketed at No. 01-1823; and the appeal of defendants from the legislative branch was docketed at No. 01-1817. Both appeals were dismissed as moot on October 7, 2002. *Schweiker v. Vieth*, 123 S.Ct. 68 (2002); *Jubelirer v. Vieth*, 123 S.Ct. 67 (2002).

for the fact that Act 34 does not possess an avoidable population deviation. Accordingly, whatever partisan effect Act 1 had, Act 34 will have as well. The court therefore incorporates by reference its discussion in *Vieth I* regarding partisan gerrymandering and holds that the undisputed facts in this case are insufficient to establish such a claim.

J.S. App. 11a-12a (internal citations omitted).

In *Vieth I*, the District Court had held:

[appellants'] allegations amount to this[:] Act 1 is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing their candidates.

J.S. App. 36a. This, the District Court said, "is simply an argument for proportional representation. However, *Bandemer* soundly rejected such a basis for an equal protection violation." J.S. App. 37a. The District Court therefore held that appellants' allegations were "insufficient to make out a cause of action" under *Bandemer*, and entered judgment in favor of the appellees and against the appellants. J.S. App. 12a. This appeal followed.

SUMMARY OF ARGUMENT

1. Partisan gerrymandering violates the Constitution, if at all, only where the disfavored party has been shut out of the political process as a whole. The Court has long recognized that politics and political considerations are inseparable from the drawing of district lines and that therefore the drawing of such lines to favor one political party or another, without more, does not violate the Constitution. The Court has also repeatedly rejected any

requirement of proportional representation: the concept that legislatures must draw districts which allocate seats as nearly as possible to a given group's anticipated share of the statewide vote. Proportional representation is, indeed, inconsistent with the idea of districting itself and is disconnected from the political reality of district-based elections. Moreover, any idea of proportional representation presupposes the existence of some base or norm against which the results of actual elections may be measured. No such norm exists, and any effort to create one would inevitably require the courts to engage in political value judgments unsuitable for judicial decision-making.

In the past, the Court has presumed that, in a democracy, political over-reaching in redistricting is both self-limiting and self-correcting; in general, the Court has intervened only where the democratic process has itself broken down and is in need of restoration. Accordingly, the Court should reaffirm its rejection of proportional representation as a constitutional mandate, and should reaffirm that a partisan gerrymander violates the Constitution if, and only if, the disadvantaged political party has been effectively excluded from participation in the democratic process — a condition which will seldom, if ever, be experienced by a major political party. This demanding standard comports with the standard developed by the Court in the context of unconstitutional vote dilution, with the Court's general reluctance to second-guess the decisions of legislatures in this most political of legislative functions, and with the understanding of the lower courts.

Alternatively, the Court may wish to take this opportunity to reconsider the justiciability of partisan gerrymandering, and on that issue we agree with the concerns expressed by the concurring Justices in *Bandemer*, and by our co-appellees from the

Pennsylvania General Assembly, that entertaining such claims may tend to involve the courts in questions better left to the other branches. We believe, however, that the narrow standard we have proposed minimizes those concerns, making it unnecessary to reconsider the issue of justiciability in this case.

2. The "majoritarian" standard put forward by appellants is not only flatly inconsistent with the Court's existing jurisprudence, it will also unavoidably engage the Court in these inherently political questions. The "majoritarian" standard is simply a variant on the proportionality test which the Court has repeatedly rejected, and which suffers from all the flaws inherent in such tests. Proportionality has no roots in the Constitution, is inconsistent with the very idea of districting, is divorced from the political reality that it intends to measure, and it is at bottom arbitrary.

The "majoritarian" variant on proportionality proffered by appellants not only shares these flaws but exacerbates them. First, appellants' standard only takes effect where the disfavored party commands more than 50% of the votes but wins less than 50% of the seats. This 50% cut-off is not only arbitrary but perverse, since it ensures that judicial intervention will occur only where it is least needed: in "swing" States which have temporarily and narrowly fallen under the unilateral control of a single political party. Second, appellants' base or norm for assessing party strength is not the votes actually cast for congressional candidates, but the votes cast in other elections, for other candidates, for other offices, and at other times. Thus, appellants regard their 40% statewide showing in the most recent congressional elections as irrelevant; under their "majoritarian" test, appellants regard themselves as the "real" majority in Pennsylvania, entitled to a majority of congressional seats. This is not only arbitrary but bizarre.

Since there is no support in the Court's unconstitutional vote dilution caselaw or *Bandemer* for appellants' proposed standard, they seek it elsewhere. According to the appellants, drawing districts on partisan lines is constitutionally indistinguishable from drawing them on racial lines. The Court, however, has consistently held otherwise, repeatedly reemphasizing the fundamental distinction between districting based on racial classifications — which are presumptively illegitimate — and districting based on political motivations, which reflect legitimate state interests. Appellants propose to Court erase that distinction, but it is firmly routed in the fundamental purpose of the Equal Protection Clause. Similarly, appellants attempt to marshal support in the Court's First Amendment cases involving political discrimination but those cases have never been extended to the inherently political task of redistricting.

3. Finally, appellants claim that Article I, §4 of the Constitution places limits on the State's redistricting authority which are more stringent than those of the Equal Protection Clause. They offer no principle reason, however, why this should be so, and neither the text of Article I, §4 nor the Court's decisions offer them any support.

Article I, §4 is a positive grant of authority to the States; it does not, by its terms, forbid the States from doing anything nor has the Court so interpreted it. While the Court has certainly held that there are limits to the authority conferred by this provision; and has likewise held that Article I, §4 does not license or immunize violations of other provisions of the Constitution, such as the Qualifications Clause, the Court has never held that a state law violated Article I, §4 itself. In this case, there is no question of Pennsylvania having exceeded its Article I, §4 authority, since Congress has both authorized and

required the States to redistrict themselves after each reapportionment.

ARGUMENT

I. Partisan Gerrymandering Violates the Constitution, If at All, Only When the Disfavored Party Has Been "Shut out of the Political Process."

A. Neither drawing district lines to serve partisan ends, nor a failure to achieve proportional representation, violates the Constitution.

Even appellants concede that "it would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines," Br. for Appellants 3; and indeed it has long been clear that the mere drawing of district lines to favor one political party or another, without more, does not violate the Constitution. The Constitution does not require the States to draw politically neutral lines for the simple reason that "there *are* no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts* 7-8, in *Representation and Redistricting Issues* (B. Grofman, A. Lijphart, R . McKay, & H. Scarrow eds. 1982) *quoted in Davis v. Bandemer*, 478 U.S. 109, 129 n.10 (1986) (plurality opinion) (emphasis added). As the Court

observed thirty years ago, in a decision upholding a bipartisan gerrymander,[4]

> It would be idle ... to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. ... Politics and political considerations are inseparable from districting and apportionment. ... It is not only obvious but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominately Democratic or predominately Republican or make a close race likely ... The reality is that districting inevitably has and is intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. 735, 753 (1973). The Court in *Gaffney* thus declined to undertake "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id.*, at 754.

In *Davis v. Bandemer, supra*, seven members of the Court — comprising all of the Justices who concurred in the judgment — rejected the idea that "the intentional drawing of district boundaries for partisan ends and for no other reasons violates the equal protection clause in and of itself." *Id.*, at 138 (plurality opinion); *id.* at 144 (O'Connor, J., concurring in the judgment) (partisan gerrymandering claims not justiciable at all). *Accord Easley v. Cromartie*, 532 U.S. 234 (2001) (recognizing "the

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[4]In a "bipartisan gerrymander," district lines are drawn so as to protect the interests of both major parties by assigning safe districts to each. *Davis v. Bandemer*, 478 U.S. at 153-155 (O'Connor, J., concurring in the judgment).

creation of a safe Democratic seat" as a "constitutional political objective").

It is also clear that the Constitution is not violated merely because a redistricting plan does not ensure that a political party will win legislative seats in proportion to its percentage of the statewide vote. To the contrary,

> Our cases ... clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocation seats to the contending parties in proportion to what their anticipated statewide vote will be.

Bandemer, 478 U.S. at 130 (plurality opinion), *citing Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971); *White v. Regester*, 412 U.S. 755, 765-766 (1973). "[W]e have required a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Bandemer*, 478 U.S. at 131 (plurality opinion). *Accord id.*, at 145 (O'Connor, J., concurring in the judgment) (proportional representation not "consistent with our history, our traditions, or our political institutions"), 155 (proportionality requirement would be "calamitous for the federal courts, for the States, and for our two-party system").

Justice O'Connor explained that a requirement for proportionality between seats and votes is inconsistent with the idea of districting itself:

> Districting itself represents a middle ground between winner-take-all, state-wide elections and proportional representation for political parties. If there is a constitutional preference for proportionality, the legitimacy of districting itself is called into question:

> the voting strength of less evenly distributed groups will invariably be diminished by districting as compared to at large proportional systems for electing representatives.

Id., at 159. Moreover, proportionality requirements lack any grounding in the real-world political process:

> [O]ne implication of the districting system is that voters cast votes for candidates in their districts, not for a state-wide slate of legislative candidates put forward by the parties. Consequently, efforts to determine party voting strength *presuppose a norm that does not exist* — state-wide elections for representatives along party lines.

Ibid (emphasis added). Scholars have echoed Justice O'Connor's point:

> Each of these [votes/seats] criteria assumes that it is meaningful to consider the state-wide vote for the legislative body in question. This is a fundamental error. There is no state-wide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and this is all there is. If the districts change, the candidates change. Their strengths and weaknesses change. Their campaigns change. Their ability to raise money changes. The issues change — everything changes. Political parties do not compete for the highest state-wide vote totals or the highest mean district vote percentages: they compete for specific seats.

Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59 (1985).

> The basic conceptual building blocks of the fair representation argument against partisan gerrymandering — the assumed existence of an identifiable minority party whose "true" strength can be objectively ascertained; the notion that minority votes are "wasted"; and the contention that parties' performances can confidently be ascribed to gerrymandering practices as distinguished from other potentially more powerful determinates of political outcomes — are highly debatable if not demonstrably false.
>
> Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solutions in Political Gerrymandering and the Courts*, 240, 250 (B. Grofman ed. Univ. of Cal. Irvine 1990).

It is thus well-established that neither partisan line-drawing, in and of itself, nor a failure to achieve seats/votes proportionality, violates the Constitution. What is not clear, and what the Court should resolve in this case, is the nature of the standard which does govern claims of partisan gerrymandering.

B. Partisan gerrymandering offends the Constitution only when the disfavored party has been denied access to the political process as a whole.

As we have seen, the Court in *Bandemer*, for good reasons, rejected any attempt to impose a requirement of seats/votes proportionality on the States. But on the question of just what limits the Constitution does place on partisan gerrymandering, no one view commanded a majority of the Court in *Bandemer*. *Cf.* 478 U.S. at 127-143 (plurality opinion) *with id.* at 144-161 (O'Connor, J., concurring in the judgment) *and id.* at 164-184 (Powell, J., concurring in part and dissenting in part). We submit

that the Court should make it clear that the use of partisan considerations in redistricting is unconstitutional when, and only when, the disadvantaged political group has "essentially been shut out of the political process," *id.*, at 140 (plurality opinion), a standard derived from the Court's decisions involving vote dilution that violates the Equal Protection Clause.[5]

Thus, in *White v. Regester*, *supra*, the Court sustained a claim of unconstitutional vote dilution because the evidence showed that "the black community has been *effectively excluded from participation* in the democratic primary selection process and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." *Id.* at 767 (emphasis added).[6] In *Gaffney v. Cummings*, *supra*, the Court explained that an election system "may be vulnerable [to challenge] if racial or political groups have been *fenced out of the political process* and their voting strength invidiously minimized." *Id.* at 754 (emphasis added). In *City of Mobile v. Bolden*, 466 U.S. 55, 69 (1980), the Court again emphasized that a viable vote dilution claim turns on

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[5]Appellants complain that the "shut out of the political process" test "eviscerates *Bandemer*," and blame this development on "misguided" lower courts. Br. for Appellants 36. In fact, as discussed in the text, the phrase "shut out of the political process" *originated* with *Bandemer*, although of course the concept behind the phrase was of long standing.

[6]The evidence in *White* included a history of official racial discrimination in Texas, a lack of black members of the legislative delegation since Reconstruction, effective control of the Democratic Party by a white-dominated organization which was neither in need of support from the black community nor responsive to its concerns, and the use of racial campaign tactics to defeat candidates supported by the black community. *Id.*, at 766-767.

evidence that "the political process leading to nomination and elections were not equally open to participation by the groups in question." And in *Rogers v. Lodge*, 458 U.S. 613, 625 (1982), the Court once more emphasized the importance of "evidence of exclusion from the political process," noting that "past discrimination had prevented blacks from effectively participating in democratic party affairs and in primary elections. ... [H]istorical discrimination had restricted the present opportunities of blacks to effectively participate in the political process." *Ibid.*

This same focus on the political process as a whole, and a group's systematic exclusion from that process, should govern in the context of partisan gerrymandering as well. The focus, in other words, should not be on the result of the political process but on whether there is access to that process at all:[7]

> The ultimate question is whether the controlling political group treats the plaintiff group as conventional political opponents or ... treat[s] the plaintiff group as pariahs and thereby render the plaintiff group unable to enter in to political coalitions or use other means for engaging in political competition on a roughly equal basis.

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[7]A more recent attempt to deny access to the political process was presented by *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer* the Colorado Constitution had been amended to prohibit "all legislative, executive or judicial action at any level of state or local government designed to protect [homosexual persons]." *Id.* at 624. In declaring the amendment unconstitutional, the Court stated "it identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." *Id.* at 633.

Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection in Political Gerrymandering and the Courts*, 64, 86 (B. Grofman ed. Univ. of Cal. Irvine 1990).[8]

This focus on the electoral system as a whole comports not only with the Court's cases on unconstitutional vote dilution, but with the Court's redistricting jurisprudence as a whole. That jurisprudence was marked, from its very inception, with the Court's determination to leave the inevitably political business of redistricting to the politicians, absent a self-perpetuating breakdown of the political process itself. The Court faced such a breakdown in *Baker v. Carr*, 369 U.S. 186 (1962), in which for sixty years all proposals to redistrict the Tennessee legislature had failed, leaving "the majority of the people of Tennessee ... no practical opportunities for exerting their political weight at the polls to correct the existing invidious discrimination. ... The majority of voters have been caught up in a legislative straight jacket." *Id.* at 248-249 (Clark, J. concurring). *See also Reynolds v. Sims*, 377 U.S. 533 (1964) (no redistricting of Alabama legislature since 1900). But in the absence of such breakdowns, the Court should continue to recognize that "the opportunity to control the drawing of electoral boundaries ... is a critical and traditional part of politics in the United States," *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment), and should leave the results of that process as it finds them.

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[8]Other analyst have made similar points. It is important to distinguish between activities that merely disadvantage parties from "actions that exclude particular parties or groups from the political system entirely" "lockouts by comparison, target particular parties or groups for persistent exclusion from the opportunity to influence the political process". Bruce E. Cain, *Garretts Temptation*, 85 Va. L. Rev. 1589, 1600-1603 (1999). *See also* Rohwer, 78 Notre Dame L. Rev. at 565.

Political parties, of course, are not racial minorities, as noted by the plurality in *Bandemer*:

> The elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group. For example, historical patterns of *exclusion from the political processes*, evidence which would *support a* vote dilution claim, are in general more likely to be present for a racial group than for a political group.

Davis v. Bandemer, supra at 131 n.12 (emphasis added). As Justice O'Connor remarked:

> Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups, and [there is] no reason to believe that they are incapable of fending for themselves through the political process.

Bandemer, 478 U.S. at 152 (O'Connor, J., concurring in the judgment) (emphasis in original). Certainly, the appellants in this case have not attempted to demonstrate their exclusion from the political process. But, as we now briefly discuss, the very narrowness of this standard works in its favor.

C. In the alternative, the Court should reconsider whether claims of political gerrymandering are justiciable at all.

We are aware, of course, that *Bandemer's* holding that claims of partisan gerrymandering are justiciable was adopted only over the vigorous dissent of three Justices. *See id.*, at 144 (O'Connor, J., concurring in the judgment). We do not disagree with the concerns

expressed in that dissent, and in the brief of the appellees from Pennsylvania's legislative branch. If the Court should reconsider this issue, we agree, for the reasons expressed in the *Bandemer* dissent and in the brief of our co-appellees, that such claims should be non-justiciable.

Nevertheless, we believe that the Court need not revisit that issue in this case. We believe that the standard we have set forth above — which is essentially the standard which the this District Court and others have been applying in the wake of *Bandemer* — narrowly cabins the circumstances under which a claim of partisan gerrymandering may succeed. This in turn has enabled the federal courts, as a practical matter, to avoid the intrusion into political questions which the *Bandemer* dissenters feared. The appellants' so-called "majoritarian" standard, on the other hand, will unavoidably require the courts to decide such questions, and we therefore turn to that subject.

II. The Court Should Reject Appellants' Proposed "Majoritarian" Standard, Which Is Simply a Variant of Proportional Representation.

A. Appellants' "majoritarian" standard is essentially arbitrary.

Appellants argue that claims of partisan gerrymandering should be judged against what they call the "majoritarian" standard: that a redistricting plan violates the Constitution when "the rival party's candidates could be consigned to less than half the seats even if its candidates consistently won a majority of votes statewide." Br. for Appellant 34. Appellants insist that their proposed test "does not compel proportional representation," *ibid*, but it is obviously just a variation on that theme.

We have already discussed above some of the shortcomings of proportional representation as a constitutional standard: its lack of any basis in the Constitution, its incompatibility with the very concept of districting, and its failure to reflect the realities of the political process.

> [v]oters do not vote for the House of Representatives or the State Legislature, but for particular candidates. A republican voter who votes for a democratic candidate for the State Senate because the republican candidate has been involved in a scandal or is too extreme in his positions or because the democrat is a personal friend or has been helpful in getting the voter a liquor license or just because the voters believed the candidate is a decent person who deserves to be reelected in spite of ideological differences, or for any of a thousand other reasons is not voting for democratic control of the State Legislature. Yet that is the way his vote is treated by the votes/seats theorist.

Lowenstein& Steinberg, *supra* at 60.[9]

To these can be added its essential arbitrariness. Any votes/seats analysis

> must inevitably rely on some notion of "normal" performance, which necessitates the use of a "base race." But a base race, to be a useful construct, must be one in which the effects of issues, candidates,

[9]Such realities include, for example, the "performance as a campaigner" of the candidates in each of the districts. Br. for Appellants 48. It is perhaps the appellants' recognized failure in considering such elements that explains their inability to accurately predict election outcomes over a period of ten months let alone a period of ten years.

> personalities, unusual party effort, and other contingent factors deemed irrelevant to the parties "true" strength are minimal. Judgments about these factors and their effects must be largely subjective and beg questions that lie at the heart of political competition and democracy.

Peter Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution in Political Gerrymandering in the Courts*, 240, 241 (Grofman ed. 1990). Moreover, because such judgments are so subjective,

> those who are most capable of making the judgment are likely to ... make unreliable witnesses because they are likely to be highly interested in the outcome of the litigation ... [T]he real motives of the litigants would be the plan's partisan consequences. Concern for these consequences would color every phase of the litigation, including its result." *Lowenstein & Steinberg*, 33 UCLA Law Rev. at 42.

In other words, the key question in any test of proportionality is, of course, "proportionate to what?" And to that question neither science, and still less the Constitution, can give a satisfactory answer. It is for these reasons that the Court has consistently rejected proportionality as a constitutional requirement; it was "clearly foreclosed" even at the time of *Bandemer*. *Id.*, at 130 (plurality opinion).

The "majoritarian" standard proffered by appellants differs from the proportional representation rejected in *Bandemer* in two ways, but both of these differences exacerbate, rather than reduce, its difficulties. First, the "majoritarian" standard would operate to invalidate a districting plan only where the disfavored political party consistently wins more than 50% of the votes but fails to

win a majority of seats. Br. for Appellants 34-35. But of course this is simply arbitrary. If the winner of 51% of the votes has a right to expect a majority of the seats, then there is no principled basis why the winner of, say, 25% or 30% or 40% should not be entitled to a similar proportional share of seats. Moreover, appellants' 50% standard could, by definition, come into play only in a State where the two major parties are at roughly equal strength: precisely where political over-reaching is most likely to be either self-limiting or self-correcting, and judicial intervention is thus least likely to be needed. But in a State dominated by one party, the dominant party could safely gerrymander the minority party out of *any* the seats with impunity. This is not only arbitrary but perverse.

Second, the appellants' measure of a political party's strength — that is, the way in which one determines whether or not a party has crossed the magic 50% line — is *not* the votes actually cast for its congressional candidates.[10] By that measure, of course, Pennsylvania's redistricting statute easily satisfies the "majoritarian" principle, since Republican candidates took 56% of the votes statewide, and won twelve of nineteen seats. The results of actual congressional elections, however, are said to be "highly misleading," Br. Opposing Mot. to Affirm 5, and a "poor measure." Br. for Appellants 38-39 n. 32. Rather, party strength is measured by analyzing past *statewide* elections for single-member offices such as President, U.S. Senator, Governor and so forth. The results of these elections are broken down by legislative districts, to determine whether the winner of the

[10]At first, appellants did rely on the votes they expected their congressional candidates to garner, *see* J.S. App. 138 (amended complaint). This change, of course, simply underlines the arbitrariness of their proposed standard.

statewide election also carried a majority of the congressional districts. If so, then the districting plan is presumably "fair," and if not, then it is "inequitable." *See* Br. for Appellants 46-47, *citing* J.A. 28-117 (Lichtman testimony).

In other words, whether a redistricting plan respects the "majoritarian" principle in *congressional* elections is to be measured, according to appellants, by analyzing the results of *other* elections, held at other times, with other candidates, for other offices. Thus it is that appellants can complain that in the 2002 congressional elections, a "Democratic majority ... carried only 7 of 19 seats." Br. Opposing Mot. to Affirm 5. The "Democratic majority" to which they refer, and which they claim was robbed of its rightful share of seats, comprises those who voted for the Democrats' *gubernatorial* candidate, *ibid*, while the fact that their congressional candidates received only 41% of the votes is dismissed as "highly misleading." *Ibid.*

Ironically, Pennsylvania's redistricting statute passes muster even under appellants' bizarre variant of the "majoritarian" standard. At the hearing on the one-person, one-vote challenge to Act 34, appellants produced an expert witness who performed the analysis just described. He analyzed nineteen statewide races over the past decade; and in every one of those races, the winner of the election also carried a majority of congressional districts. J.A. 84- 87 (Lichtman testimony), 273-276 (election statistics). Thus, whether in the real elections of the real world, or in the hypothetical elections of appellants' "majoritarian" test, there is no sense in which Pennsylvania's statute can be said to "frustrate majority rule." Br. for Appellants 31.

But the larger point is that appellants, although they claim to seek to vindicate the principles of *Bandemer*, in fact seek *Bandemer's* abandonment, and its replacement

with a scheme which ultimately rests upon political, rather than constitutional, judgments. It is not just that redistricting is a political task, or that there are no neutral lines for legislative districts and neutral criteria for redistricting.[11] It is also that the redistricting process itself is not grounded in broader principles that command general assent; rather whatever is to guide the redistricting process is itself one of the objects of the political struggle. Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. Rev. 1, 9-35, 73-75 (1985).

The Court was presented with similar circumstances in *United States, Department of Commerce v. Montana*, 503 U.S. 442 (1992). In *United States, Department of Commerce v. Montana*, the Court was faced with a challenge involving the census and the reapportionment of Congress. The Court recognized that apportionment of Representatives among the several states is to be accomplished "according to their respective Numbers." *Id.* at 444 (quoting United States Constitution, Article I, §2), and that Congress, pursuant to statute provided that "the method known as the method of equal proportions" shall be used to determine the number of representatives to which each state is entitled." *Id.* (quoting 2 U.S.C. §2a(a)).

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[11]The traditional districting criteria of compactness, political subdivisions, and communities of interest are neither grounded in the Constitution nor constitutionally required. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993). Nor are they susceptible to simple and straightforward application without resolving partisan issues, nor are they neutral in the sense that they do not systematically favor one party over another. Lowenstein & Steinberg, *supra* 21-35. Moreover, these criteria are not neutral in another sense. The districting process is a political competition. These criteria are simply tools to be used in the service of that competition. *Id.* at 35.

Rejecting application of the one person, one vote principle, the Court held that in the context of apportionment of seats among states "neither mathematical analysis nor constitutional interpretation provide a conclusive answer. In none of these alternative measures of inequality do we find substantive principles of commanding constitutional significance. The poll star of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course. . . . The constitutional framework that generated the need for compromise in the apportionment process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders." *Id.* at 463-464. Choosing among various methods of apportionment "commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Id.* at 464. A like circumstance is presented in the redistricting context.

There is no constitutional guide for deciding whether it is better to maximize competition at the district level — as appellants suggest, Br. for Appellants 4-6 — or to maximize the protection given to incumbents, with their accumulated experience and seniority. Deciding between those values is an inherently political question.

The point is not to identify all of the myriad of public interest goals that come into play in choosing among competing redistricting plans, nor to identify the effects of isolating one value, such as competitiveness, and sacrificing all others on its behalf. *See* Lowenstein-Steinberg, *supra* at 37-49, and also Persily, *supra* at 670-681. The point is that these competing political values exist and that "[t]here are tradeoffs for each approach. Good arguments can defend each approach, but it would be truly remarkable for unelected judges with lifetime

appointments to decide that competition is the value that should be placed above all others." *Id.* at 680. It would be no less remarkable for the Court to adopt appellants' essentially arbitrary "majoritarian" standard.

B. Appellants' "majoritarian" standard has no support in the Court's case law.

Appellants claim that their proposed standard finds support both in the Court's cases involving infringements on the voting rights of racial minorities, and in the Court's First Amendment cases involving political discrimination. Neither line of cases, however, provides them with any real support. Certainly, nothing in any of these cases comes close to endorsing appellants' "majoritarian" approach to redistricting.

As to the racial voting cases, the Court has repeatedly warned that the standards which apply in those cases cannot be simply imported wholesale into the realm of political gerrymanders.

> Classifying citizens by race, as we have said, threatens special harms that are not present in our vote dilution cases. It therefore warrants different analysis.
>
> * * *
>
> [N]othing in our caselaw compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race, . . . would seem to compel the opposite conclusion.

Shaw v. Reno, 509 U.S. 630, 650 (1993). In *Bush v. Vera*, 517 U.S. 952 (1996), the Court emphasized again that where race is the predominant factor motivating the legislature's redistricting decisions strict scrutiny applies, *id.* at 959, but noted that "strict scrutiny would not be appropriate if race-neutral traditional districting considerations predominate over racial ones. We have not subjected political gerrymandering to strict scrutiny." *Id.* at 964. The Court has repeatedly reemphasized the fundamental distinction between districting based upon racial classifications and districting based on other criteria such as "party preference." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

The reason for this distinction is obvious: while racial classifications are inherently suspect, political classifications are inherent to the redistricting process itself. As Justice O'Connor succinctly put it, "[p]olitical affiliation is the keystone of the political trade. Race ideally is not." *Davis v. Bandemer*, *supra* at 161 (O'Connor, J. concurring in the judgment), quoting *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 171 n.1 (1977)(Brennan, J. concurring).

The same can be said of the Court's political discrimination cases. The Court has never extended the reasoning of *Elrod v. Burns*, 427 U.S. 347 (1976) and its progeny to redistricting, and again the reason is obvious. Political considerations are not inherently part of the process of hiring and firing, say, deputy sheriffs, but they are "absolutely unavoidable," *Gaffney v. Cummings*, 412 U.S. at 753, in redistricting.

III. Article I, Section 4 of the Constitution Adds Nothing to Appellants' Claim.

Finally, appellants claim that Article I, § 4 of the Constitution places limits on the States' redistricting

authority which are more stringent than those of the Equal Protection Clause or Article I, § 2. Br. for Appellants 25. They offer no principled reason, however, why this should be so, and neither the text of Article I, § 4, nor the Court's decisions, offer them any support.

Article I, §4 provides that:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

In explaining this provision, Alexander Hamilton characterized it as "that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members." *The Federalist*, No. 59, p.393 (Alexander Hamilton) (Harvard Col. ed. 1961). Hamilton points out that as such power over elections must exist somewhere.

> ... [I]t must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for federal government, in the first instance, to the local administrators; which, in the ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

Id. at 394. Hamilton goes on to characterize precisely what authority is encompassed in the provision. "Its authority would be expressly restricted to the regulation of the *times, places, the manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." *The Federalist*, No. 60, p.402 (Alexander Hamilton) (Harvard Col. ed. 1961) (emphasis in original).

The provision is, on its face, entirely consistent with Hamilton's explanation of it as a positive, if limited, grant of authority to the States; it does not, by its terms, forbid the States from doing anything, nor has the Court so interpreted it. The Court's cases do repeatedly seek to ensure that this limited grant of authority does not provide license or immunization for some otherwise unconstitutional activity. Reviewing that caselaw in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court confirmed that "nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote...." *Id.* at 529. But the Court has never struck down a state law as a *violation* of Article I, § 4.

Appellants cite *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). However, as the Court made clear in that case, the action did not involve some independent violation of Article I, §4 but a violation of the Qualifications Clauses. *U.S. Term Limits* involved a state constitutional amendment prohibiting the name of an otherwise eligible candidate for congress from appearing in the ballot if that candidate had already served a set number of terms. The Court recognized that this implicated the Qualifications Clauses and declaring the amended unconstitutional emphasized "The framers

intended the Election Clause to grant states authority to create procedural regulations, not to provide states with license to exclude classes of candidates from federal office." To the same effect is *Cook v. Gralike*, 531 U.S. 510 (2001) (ballot notations on candidates who failed to support term limits violated Qualifications Clause).

Appellants rely on the following passage from *U.S. Term Limits*:

> [T]he framers understood the Election Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates or to evade important constitutional restraints.

Id. at 832-834, *quoted in* Br. for Appellants 27. But in this case there is of course no question of Pennsylvania attempting to "dictate electoral outcomes." Naturally, Pennsylvania's redistricting statute — like every other redistricting statute — cannot fail to *affect* electoral outcomes, but that is unavoidable. "The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. at 753.

Nor is there any question of Pennsylvania having exceeded its Article I, § 4 authority. Congress, exercising its own authority under Article I, § 4, has authorized and required the States to establish congressional districts. *See* 2 U.S.C. § 2c ("In each State entitled ... to more than one Representative ... there shall be established a number of districts equal to the number of Representatives...."); *id.*, § 2a (after reapportionment, States to be "redistricted in the manner provided by the law thereof"). Unless, therefore, Pennsylvania's congressional redistricting plan violates some other

constitutional provision — such as the Equal Protection Clause or Article I, § 2 — it must be upheld.

CONCLUSION

The Court should affirm the District Court's judgment.

Respectfully submitted,

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General

J. BART DELONE*
Senior Deputy Attorney General

Office of Attorney General
Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-3226

Counsel for Appellees Cortés and Accurti

*Counsel of Record

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